



<u>Decision Ref:</u>	2022-0067
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Personal Pension Plan
<u>Conduct(s) complained of:</u>	Failure to provide accurate investment information Maladministration Poor wording/ambiguity of policy Misrepresentation (pensions)
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns the Complainant's pension plan.

The Complainant's Case

The Complainant says that her pension plan which is relevant to this complaint was sold to her in **1991** and that, to date, the Provider has given her limited information on the operation of her pension fund. The Complainant states that she has made complaints to the Provider for several years, since she became concerned by the way in which it was administering her pension fund. She argues that she has not received a satisfactory resolution of these complaints.

The Complainant argues that her overall complaint is based on the fact that the Provider has imposed conditions, penalties, fees and charges that are not allowed for, in the contract and conditions.

The Complainant says that in **February 2018**, she made a formal complaint to the Provider stating that, for reasons unknown to her, the Provider had either given her incorrect, incomplete or no answers to the questions she had posed. The Complainant contends that in the Provider's final response letter dated **7 March 2018**, it answered a selection of the questions asked and that for others, it referred to Appendix 1 of its response, which was a transaction history.

The Complainant submits that an enormous amount of time has been spent by her analysing the 107 pages of data in the transaction history and reviewing the information she was given. She says that she finds the Provider's unwillingness to provide information very concerning. The Complainant argues that the conclusion of this work caused her to realise that the Provider has not provided correct information in response to many of her questions. She argues that it has supplied confusing, inaccurate and incorrect information. Further, she argues, the Provider has imposed, or proposes to impose, charges or restrictions not contained in the contract or contract conditions.

The Complainant contends that the Provider has imposed charges and penalties not allowed for in the contract and that she has suffered financial loss as a result. She argues that a review of the transaction history has shown:

- entire payments and part payments not credited to the fund,
- fee increases not allowed for in the contract,
- charges for which no explanation was given,
- initial units sold at incredible discounts to the date relevant value,
- multiple crediting and debiting of transactions,
- substantial overcharging of the pension levy,
- unexplained changes in initial units,
- new payment charges not allowed for in the contract,
- incorrect total amount of initial units purchased, and
- incorrect total amount contributed to the plan.

The Complainant has made detailed arguments in respect of initial units being used as a mechanism to recoup charges associated with the plan, such as commission, administration and underwriting costs. She argues that these charges are shown as an early withdrawal penalty but that the contract has no direct definition of an 'initial unit'.

She highlights relevant clauses such as:

clause 2(n) (definition of a unit)
clause 14 (amount of annuity) and
clause 12 (determination of unit prices)

She argues that there is no mechanism in the contract for future charges and that the clause dealing with the amount of annuity, does not refer to any of the penalty terms used by the Provider. She argues that clause 12 has the impact of increasing the amount paid for each unit by 5.26%, so a charge is levied on the purchase of each unit, which is separate from the actual management charge. She argues that there is no clarity as to how the base unit values are arrived at, or the discount to the unit value. She further argues that no information was provided to her at the inception of the pension, in respect of the conditions concerning inflation protector, the allocation mechanism or the charging mechanism.

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The Complainant contends that no information was given at the time of a pension review in **1995** or in statements about the significance of the difference between initial units and accumulator units. The Complainant argues that the impact of the high management charge on initial units is that by **2017**, an initial unit is priced at 23.15% of accumulator units and by the time she reaches her 70th birthday, each initial unit will be worth 11.1% of an accumulator unit. She argues that these figures were extrapolated by her from analysis of the transaction history provided by the Provider.

The Complainant argues that she met with an employee of the Provider's predecessor in **April 1995** and significantly increased her monthly contribution to the pension thereafter. She argues that there was no discussion at the meeting regarding penalties, actuarial funding factors, initial unit chasing factors, reduced allocation rates, transfer values or the setting of the date of retirement. She argues that she was not provided with a copy of the terms and conditions in plain English. The Complainant argues that if she had been provided with appropriate advice at the meeting, she would not have increased her monthly payment under the existing plan but would have started a new plan to ensure that the contract conditions would be subject to the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, SI 27/1995 (**Unfair Terms Regs 1995**).

The Complainant says that the Provider is seeking to impose a significant financial penalty on her if she seeks to retire before age 70. The Complainant asserts that the contract conditions do not allow for the imposition of this penalty and that she should be allowed to take a pension without penalty from age 60. She argues that she will suffer financial loss if the penalty is imposed. The Complainant further asserts that the Provider has stated that an early withdrawal penalty will be imposed if the funds are transferred and that she has been prevented from moving her fund to a less risky investment fund, due to the imposition of the penalty.

The Complainant highlights that the face of the contract provides that the earliest annuity commencement date is on her 60th birthday and the latest annuity commencement date is her 70th birthday. She also highlights a brochure which indicates that one of the advantages of the plan is that she can decide at what age she receives her pension. The Complainant argues that the contract does not state that there is penalty for taking the pension before her 70th birthday. The Complainant notes that clause 2(c) of the contract definitions define the "*chosen annuity commencement date*" as the 70th birthday of the contract holder. She argues that this has to be read, subject to the specific conditions appearing on the face of the contract, which provide for retirement between 60 and 70 years. The Complainant argues that the face of the contract is the controlling document from the interpretation of the contract conditions. She argues that as the chosen annuity commencement date is really any date between 60 and 70 years, there can be no penalty for taking the pension from her 60th birthday onwards.

The Complainant argues that all references in the contract conditions to the 70th birthday are superseded by a contract definition of the "*chosen annuity commencement date*" being the earliest her 60th birthday and the latest her 70th birthday. Any reference to the 70th

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birthday, she argues, is therefore the date chosen by her to retire between the ages of 60 and 70.

The Complainant argues that under clause 6(c) of the Terms and Conditions which deals with the allocation of units, initial units should be converted to accumulator units at the valuation date from the start of the pension. She argues that the mechanism for such conversion needs to be verified, as does the entire operation of the initial unit price setting throughout the entire operation of contract.

The Complainant contends that the actions taken by the Provider in the administration of her fund have taken place since the start of the contract and during the life of the contract and will impose financial penalty on her in the future.

The Complainant argues that the terms of the contract should fall foul of the Unfair Terms Regs 1995. She argues that the way the Provider has managed, operated and intends to operate her pension, demonstrates that she has been subjected to unfair contract terms and that the Provider has imposed charges, fee increases, and penalties that she was not aware of and had no ability to negotiate.

The Complainant rejected a €1,500 customer service offer from the Provider.

The Complainant wants the Provider to:

1. comply with the contract and allow for a pension to be taken from her 60th birthday;
2. remove all penalties in relation to moving the fund within or out of the Provider's operation;
3. correctly credit the fund with all payments and recalculate the fund value;
4. reimburse fee overcharging and recalculate the fund value;
5. reimburse charges not allowed for in the contract and recalculate the fund value;
6. reimburse pension levy overcharge and recalculate the fund value;
7. reimburse initial units offered at substantial discount and recalculate the fund value;
and
8. correct all errors within the operation of the plan and recalculate the fund value.

The Provider's Case

The Provider argues that the terms and conditions of the Complainant's plan provide for a penalty to apply when benefits are taken before the "*chosen annuity commencement date*" which is age 70. It argues that this is set out in paragraph 2(c) of the terms and conditions.

The Provider says that in **1991** when the Complainant's plan started, 70 years of age was the maximum age at which a personal pension plan could be claimed, and writing personal pension plans to this age allowed contract holders to save for their retirement over the maximum possible term. It argues that this was standard in the industry at the time.

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The Provider argues that there are initial and accumulator funds on the plan. It submits that if the Complainant retires at her plan's normal retirement age of 70, all initial units will have had the opportunity to be converted to accumulator units at this date in accordance with paragraph 6(c) of the terms and conditions.

It submits that in instances where benefits are taken before this date, there will be a combination of both initial and accumulator units on the plan. It submits that at that point in time, an initial cashing value (also referred to as an early withdrawal penalty) is applied to the value invested in the initial unit fund (as per paragraph 14(b) of the terms and conditions) and this reduces the value of the fund to reflect the loss of future fund management charges that would no longer be collected, as benefits are being taken from the plan before the plan owner's 70th birthday.

The Provider argues that when the Complainant's plan was written in **1991**, it was expected that the plan would remain in force until age 70 with all contributions and charges continuing up to this time. As the plan gets closer to its normal retirement date (age 70), the initial cashing factor reduces and eventually reduces to zero at age 70, as all initial units have then been converted to accumulator units, reflecting the fact that all plan charges due to the Provider over the term of the plan have been fully collected. The Provider argues that this is provided for by paragraph 6(c) of the terms and conditions. It argues that the reduction in value on transferring or taking benefit before age 70 is provided for in paragraphs 14(b), 18 and 26 the terms and conditions.

The Provider argues that the charging structure of initial and accumulator units were typical of pension products in the industry at the time that plan was taken out in **1991**. It further argues that if the chosen annuity date had been age 60 instead, the charges due to the Provider over the term of the plan would have been the same. By writing the plan to 70, it argues that the same level of charges are deducted but they are simply spread out over a longer term.

The Provider argues that the penalty for transfer to another pension provider is the very same as when benefits are drawn down before the age of 70. It argues that both result in the cancellation of the personal pension before 70, triggering a reduction in value because all initial units would not have had the opportunity to convert to accumulator units. It confirms that there is no charge for switching investment funds, within the plan.

The Provider argues that it is satisfied that the terms of the personal pension policy are fair and reasonable for a product of its nature. It argues that the terms applicable are typical of a personal pension sold in **1991**. It further argues that it is satisfied that the terms of the policy do not contain any unfair terms within the meaning of the Unfair Terms Regs 1995.

The Provider argues that the Complainant first contacted it by email dated **5 October 2017** requesting some technical and detailed information on her plan. It states that it responded on **18 October 2017**. The Provider says that the Complainant emailed it again on **26 October 2017** with a series of detailed and technical queries on her plan and it responded by email

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on **7 November 2013**. Further queries were raised by the Complainant on **10 November 2017** and the queries were sent to the Provider's actuarial team.

The Provider states that whilst it attempted to answer all of the queries raised by the Complainant, it acknowledges that service was at times lacking and for that reason it has offered a customer service payment of €1,500 by way of apology to the Complainant. Further, it argues that the unit transaction history provided to the Complainant as part of its final response letter of **7 March 2018** could have been clearer and it contained errors. The Provider apologises for this and the confusion that was caused.

The Provider acknowledges that the Complainant has concerns about the administration of her plan but it is satisfied that the plan has been correctly administered in line with her plan terms and conditions and that the value of her plan is correct and accurate. It argues that its actuarial team has reworked the Complainant's plan from date of entry and it is satisfied that, apart from one issue that arose on a number of plans, there were no errors or issues of maladministration. The Provider has submitted a document prepared by its actuarial team in **April 2019** which provides a detailed response to the issues raised by the Complainant.

The Provider argues that the one issue that was identified during a routine audit, would have arisen whether or not a complaint had been raised, and this concerned certain pension products, like the Complainant's, which were in a 'paid-up' state. It argues that as result of a system error, some of these plans failed to have their annual bonuses automatically applied, once the status of the plans changed to 'paid-up'. It argues that the Complainant's plan was made 'paid-up' with effect from **1 November 2017** and the bonuses for **2018** and **2019** were not automatically added. It argues that this issue has been corrected with the **2018** and **2019** bonuses totalling **€2,055.79** having now been applied to the plan, putting the plan into the exact same position it would again have been in had the error not occurred.

The Provider argues that there was never an unwillingness on its part to provide information to the Complainant about her plan. It argues that the level of information sought by the Complainant was vast, very technical and very detailed. It says that queries of this nature take longer to respond to, and unfortunately the Provider's attempts to respond fell short of the information which she required. It argues that given the very technical details sought by the Complainant on the history of the plan, it was felt at the time, that a unit transaction history read in conjunction with clarifications would help answer her queries. In hindsight, the Provider accepts that it did not help and in fact, because the transaction history was not fully accurate, the history raised more questions than it answered.

The Provider has submitted an explanation of fees applied from inception. It argues that payment charges and plan fees may not match exactly to what is shown in the Complainant's annual benefit statement, due to its method of calculation.

The Provider has also submitted a detailed explanation of the operation of the pension plan dated **9 April 2019** explaining the investment and allocation of premiums, the use of "slices" to record proportions of monies, indexation, initial units cashing factors, unit adjustments, expenses including risk costs, investment bonuses, policy fees, and pension levy. The document notes that there were a few minor inaccuracies/discrepancies in the investment

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history previously provided to Complainant, but that these have been remedied for the purposes of the **April 2019** document.

The Complaint for Adjudication

The complaint is that the Provider has:

1. poorly managed the administration of the Complainant's pension fund;
2. poorly communicated with the Complainant, including the provision of misinformation; and
3. wrongfully charged the Complainant.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint. Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **5 January 2022**, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter. Following the consideration of additional submissions from the parties, the final determination of this office is set out below.

Since the preliminary decision of this Office was issued to the parties, the Complainant has submitted that the FSPO's preliminary decision illustrates a considerable number of errors of fact and law, which she has articulated over many pages of her submissions, which the Provider elected not to reply to.

I note in that regard that, in addition to submissions regarding "*Specific Errors in Fact and Law*", including many instances of the suggested misinterpretation by this Office, of the

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terms of the contract, the Complainant says that there has been a subjugation of specific contractual terms by this Office.

In addition, the Complainant says that this Office:

“has accepted the contract to be between equal parties. The Contract Conditions are of the Standard Form. I had no ability to negotiate any terms or contract conditions. The interpretation of such a contract and contract conditions must follow the “Contra Proferentem” Rule.”

The Complainant also submits that the FSPO has also made an error in law by refusing to investigate direct evidence of *“financial loss occasioned to a complainant by an act of maladministration done by or on behalf of the pension provider”*. She also says that this Office has been guilty of **“General Errors in Fact and Law”**, advising that:

“A summary of errors in Law and Fact are noted below and further detailed in Parts 2, 3 and 4 where new evidence is presented.

Generally, the errors in law and fact can be summarised in line with the areas:

- 1. Jurisdiction*
- 2. The Providers*
- 3. Switching Funds*
- 4. Annuity Commencement Date*
- 5. Early Withdrawal Penalty*
- 6. Charges*
- 7. Failure to investigate*
- 8. Provision of Information”*

As outlined in the preliminary decision of this Office in January 2022, it falls outside the jurisdiction of this Office to investigate any complaint about the information or advice provided or not provided to the Complainant, regarding the contact terms and conditions, in **1991** at the time of her discussions, in advance of her entry into the pension plan. The same issue arises regarding information or advice provided to her at the time when she increased her payments to the plan, in **1995**. The investigation of conduct that occurred some 23 years and 27 years before the complaint was made to this Office, is beyond the jurisdiction of the FSPO pursuant to **Section 51** of the **Financial Services and Pensions Ombudsman Act 2017**.

I note that the pension plan was sold to the Complainant in **1991** by the original provider (the **first provider**) and it was amended in **1995** by another provider (the **second provider** which took over the pension plan in **late 1992**) the second provider being the predecessor of the respondent Provider to this complaint (which acquired the plan in **2014** and which has taken over the responsibilities of delivering on that contractual agreement which came into being many years ago). It is the conduct specified above under the heading **“The Complaint for Adjudication”** which is the subject of this legally binding decision.

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I also note the new complaint raised by the Complainant by email dated **30 November 2020** in relation to information suggested to have been given by the Provider to her financial adviser in **December 2016** and to herself thereafter, in respect of changing funds within the plan. This complaint – concerning a lack of information on and misinformation in respect of her options for moving or changing funds within her plan – did not form part of her initial complaint to the Provider and was not addressed in the Provider’s final response letter.

In the preliminary decision of this Office, I noted that if the Complainant remains unhappy with this new element of the issue she has more recently raised, she can pursue this as a new complaint directly with the Provider, to be addressed by the Provider in a final response letter. This may resolve that new matter, but if thereafter, the Complainant remains dissatisfied, she may then pursue a new complaint to this Office, in the usual manner. I note that the Complainant believes that because the Provider’s final response letter refers to “switching” within the fund, this should be adequate, but I am not satisfied to proceed with an adjudication of that more recent issue, until such time as it can be fully investigated. That newer issue is not identified as part of the conduct complained of in this investigation, under the heading above **“The Complaint for Adjudication”**.

This complaint investigation can be broken down into three main issues:

- A. the issue of the chosen annuity commencement date under the contract and the Complainant’s contention that the Provider is not entitled to impose an early withdrawal penalty, if she elects to take her pension benefits before the age of 70;
- B. the issue of charging and the value of the fund, including fees, charges, the crediting of payments to the fund, the price of sale of units, value of initial and accumulator units, and overcharging of the pension levy; and
- C. the provision of information by the Provider.

A. Annuity Commencement Date and Early Withdrawal Penalty

I note that the brochure issued by the first provider in respect of the Complainant’s personal pension plan stated as follows:

“What happens when I retire?

...

An added bonus is that you decide at which age you receive your pension. If you want to retire gradually over a period of years, you can adjust your pension to suit your needs.*

** At any age between 60 to 70*

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....

Allocation Procedure

For the first two years of your contract premiums are allocated to Initial Units. Incremental premiums are also allocated to Initial Units for two years. Thereafter premiums are allocated to Accumulator Units. The allocation rate in the first four years of the original premium or the incremental premium depends on the term of the policy. Thereafter allocation is at 103.5%.

...

Charges

Charges are deducted to cover initial and ongoing administration and fund management expenses.

- *Management Charges.
A charge of 0.75% is levied on Accumulator Units and a charge of 4.75% is levied on Initial Units.*

All the following charges are deducted from Accumulator Units. If there are insufficient Accumulator Units the charges are carried forward as a debt.

- *A 3% government levy on the value of new premiums.*
- *A Policy Fee of £2.60 per month.*
- *Any Term Assurance premiums."*

I note that the brochure does not form part of the terms and conditions of the pension, though I accept the Complainant's recent submission that it may be relevant to the interpretation of the contract. I note that the brochure indicated that the pension plan in question would allow a contract holder to retire between 60 and 70 years of age. The brochure further indicated that contract premiums would be allocated to initial units for the initial two years and that a management fee of the 4.75% applied to initial units with a lower fee of 0.75% applied thereafter to accumulator units.

The cover page of the contract or the 'contract face' provides as follows:

"LATEST ANNUITY COMMENCEMENT DATE: 70TH BIRTHDAY OF CONTRACT HOLDER

EARLIEST ANNUITY COMMENCEMENT DATE: 60TH BIRTHDAY OF CONTRACT HOLDER

....

This Contract records that, in consideration of the payment of all contributions as they fall due, [the first provider] (hereinafter called "The Company") will grant the benefits set out in this Contract in accordance with the particulars set out on the face of the Contract and subject to the conditions contained in this Contract and in any endorsements to this Contract."

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The relevant Contract Conditions of the plan are as follows:

"2. DEFINITIONS

...

(c) "Chosen Annuity Commencement Date" means the 70th birthday of the Contract Holder.

...

(n) "Unit" means a share of the total value of the Fund. Different types of Units reflect different rates of Management Charge and different taxation allowances. Units of each type are of equal value to all other Units of the same type. This Contract is linked to Initial and Accumulator Units. The allocation of Units to this Contract is based on the Unit Offer Price and the determination of benefits linked to the Fund is based on the Unit Bid Price. Unit Offer and Bid Prices are related to the Unit Value, these expressions being further defined in Clause 12 hereof.

...

6. ALLOCATION OF UNITS

(a) Where allocation to Units has been elected the Normal Pension Contribution and any Increment described above in sub-Clause 3(g) (all adjusted under sub-Clause 5(a) shall be allocated to Initial Units during the first two years of payment of such Normal Pension Contributions or Increment, or during such longer period as may be determined by the Actuary should such Normal Pension Contribution or Increment not have been paid in full during such two years and thereafter such Normal Pension Contribution or Increment shall be allocated to Accumulator Units.

(b) ...

(c) On the Contract Holder's 70th Birthday all attaching Initial Units shall be converted to Accumulator Units in the same Fund.

....

14. AMOUNT OF ANNUITY

(a) On retirement on the Chosen Annuity Commencement Date, the Annuity payable shall be the Benefit Fund multiplied by a factor. This factor shall be determined by the Actuary having regard to the age and sex of the Contract Holder, mortality rates, the yields of certain Government Securities and such other matters considered by him to be relevant at the date of commencement of Annuity.

(b) On retirement before the Chosen Annuity Commencement Date the Actuary may adjust the Benefit Fund by such amount as shall be determined by him to be relevant at the date of retirement. The Annuity payable shall be this Adjusted Benefit Fund (or Benefit Fund if no adjustment is required) multiplied by a factor. This factor shall be determined by the Actuary having regard to the age and sex of the Contract Holder, mortality rates, yields of certain Government Securities

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and such other matters considered by him to be relevant at the date of commencement of the Annuity.

...

16. ANNUITY OPTIONS AND ELECTIONS

(a) Commencement of Annuity

At the election of the Contract Holder the Annuity shall commence and the first payment in respect thereof shall fall due, subject to the provisions of Clause 14, 15 and 17, on some date before the Chosen Annuity Commencement Date, provided that the date so chosen shall not be earlier than the 60th birthday of the Contract Holder . . .

...

(f) General

If an election is made under one of more of sub-Clauses 16(a), 16(c) and 16(d) then any adjustment to the annual amount of the Annuity shall be determined by the Actuary.

...

18. OPEN MARKET OPTION

On any date being not more than 3 months earlier than the Chosen Annuity Commencement Date as shown on the face of the Contract or the date on which the Annuity shall commence at the election of the Contract Holder in terms of Clause 16 if different and provided that the Company has received not less than 14 days prior notice in writing, the Contract Holder may elect that the Benefit Fund, or if retiring before the Chosen Annuity Commencement Date the Adjusted Benefit Fund shall be paid by the Company to any person lawfully carrying on in Ireland the business of granting Annuities on human life to be applied as a premium under a Substituted Contract.

..."

The evidence shows that an Endorsement to the policy was issued by the second provider on **3 May 1995** to facilitate an increase in the monthly contributions to **€218.75**. An RAC Certificate issued by the second provider, dated **4 May 1995** and effective from **1 May 1995**, evidences the increase in monthly premiums from **1 May 1995**. The RAC Certificate notes as follows:

"5. Due Date of last payment [day and month redacted] /2035"

The Complainant has forcefully argued that as the contract face indicates that she can retire at the earliest of the age of 60, and at the latest that the age of 70, this means she can retire without penalty at any date between the ages of 60 and 70.

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The Complainant argues that all references in the terms and conditions of her plan, must be read subject to what is written on the contract face i.e. that she can retire at the earliest at 60 and at the latest at 70. This ability to retire between 60 and 70, she argues, overrides the definition of “*Chosen Annuity Commencement Date*” of 70 years of age in the contract terms and conditions.

The Complainant argues that because she is entitled to retire at any stage, between age 60 and 70, there can be no early withdrawal penalty applicable. Further she argues that there is no term of the plan, which provides for an early withdrawal penalty or charge, in the event that she retires before the relevant retirement date.

Having considered the contractual documentation in detail, I cannot agree with the Complainant’s position. I accept that the first page of the contract/’contract face’ provides that the *earliest* annuity commencement date is her 60th birthday and the *latest* annuity commencement date is her 70th birthday. This is also flagged in the brochure for the plan. It does not however provide, for the ***chosen*** annuity commencement date for the plan. The chosen annuity commencement date is defined in clause 2(c) of the plan’s terms and conditions and, in my opinion, it clearly and unequivocally states that the chosen annuity commencement date is the Complainant’s 70th birthday. This is supported by the RAC Certificate dated **4 May 1995** which specifies that the due date of the last payment is in 2035, coinciding with the date of the Complainant’s 70th birthday.

I note that since 2017, the Provider has communicated this position to the Complainant at all times, clearly and consistently, in emails, letters and over the phone. It has also provided her with an explanation of why plans taken out in the early **1990s** were set to a maturity date of 70 years of age.

I do not agree that there is a conflict between the first page of the contract and the contract terms and conditions in the present matter. In my view, the first page of the contract and the terms and conditions both confirm that retirement under the plan can occur between the ages of 60 and 70, at the election of the contract holder. This is accepted by the Provider. I accept however that this is different from the specified normal retirement age of the plan, or the “*chosen annuity commencement date*” of the plan, which is set at 70 years of age.

For completeness, I do not accept the Complainant’s argument that clause 18 of the terms and conditions changes this position. Clause 18 provides that:

“On any date being not more than 3 months earlier than the Chosen Annuity Commencement Date as shown on the face of the Contract or the date on which the Annuity shall commence at the election of the Contract Holder in terms of Clause 16 if different and provided that the Company has received not less than 14 days prior notice in writing, the Contract Holder may elect that the Benefit Fund, or if retiring before the Chosen Annuity Commencement Date the Adjusted Benefit Fund shall be paid by the Company to any person lawfully carrying on in Ireland the business of granting Annuities on human life to be applied as a premium under a Substituted Contract.”

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In my opinion, simply because there is reference in this clause to a “*Chosen Annuity Commencement Date as shown on the face of the Contract*”, does not mean that a chosen date appears on the first page (or contract face) of the Complainant’s plan. As noted above, there was no “*chosen*” annuity commencement date set out on the first page of the Complainant’s contract.

Instead, what is set out, are the earliest and latest dates that the Complainant could retire at, under the plan. The chosen date for retirement is set out “on the face of the contract” in clear and express terms, in the plan’s terms and conditions, specifically at clause 2(c). I am satisfied that this is the relevant date for the purposes of clause 18 i.e. the chosen annuity commencement date as shown on the face of the contract. The clause also confirms that if the Complainant wishes to move her pension fund to a different provider before her 70th birthday, the adjusted benefit fund (as discussed further below) would be transferred, rather than the entire benefit fund.

I am satisfied accordingly that the Provider was entitled to determine that the Complainant’s retirement date under the plan, is 70 years of age. The next question is whether the Provider is entitled to apply an “*early withdrawal penalty*” if the Complainant chooses to retire between the ages of 60 and 70, as permitted under the plan’s terms and conditions. While the terms and conditions in this regard are not as clear as one might hope, I am satisfied that clause 14(b) allows the Provider to apply what is effectively an early withdrawal penalty (though that phrase is not used in the plan) by way of an “adjustment” to her benefit fund.

I note in that regard that Clause 14(b) provides that:

“On retirement before the Chosen Annuity Commencement Date the Actuary may adjust the Benefit Fund by such amount as shall be determined by him to be relevant at the date of retirement. The Annuity payable shall be this Adjusted Benefit Fund (or Benefit Fund if no adjustment is required) multiplied by a factor.”

[Emphasis added]

This can be contrasted with clause 14(a) which provides as follows:

“On retirement on the Chosen Annuity Commencement Date, the Annuity payable shall be the Benefit Fund multiplied by a factor.”

Therefore, I note that when a contract holder retires on the chosen date, the annuity payable is based on the benefit fund. When the contract holder retires before that date, the actuary can adjust the benefit fund and the annuity payable is based on the adjusted benefit fund. While clause 14 does not use the term “penalty” or “charge”, I am satisfied that an adjustment to the benefit fund is allowable when a contract holder retires, on a date before the chosen annuity commencement date.

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In my opinion, there are other references to an adjusted benefit fund in other clauses of the terms and conditions which support this interpretation. Most notably, Clause 16(a) allows a contract holder to elect to commence their annuity on a date before the chosen annuity commencement date *“provided that the date so chosen shall not be earlier than the 60th birthday of the Contract Holder”*.

Clause 16(f) provides that:

“if an election is made under ... sub-Clauses 16(a) ... then any adjustment to the annual amount of the Annuity shall be determined by the Actuary.”

In my view, clause 16 clarifies that where early retirement is taken by a contract holder between the ages of 60 and 70, the benefit fund will be adjusted by the actuary, and this is permissible under clause 14(b).

While I would expect a modern contract to be clearer in its terminology regarding the application of what is in effect, an early withdrawal charge to a pension fund, I acknowledge that this contract was entered into in **1991** and prior to any legislation or regulatory guidance encouraging the use of clear and simple and customer-friendly contractual language.

In any event, I am satisfied that in accordance with the terms and conditions that apply to the Complainant’s pension plan, the Provider was entitled to determine that the chosen retirement date is 70 years of age and the Complainant’s benefit fund can be “adjusted” as appropriate. Accordingly, I do not consider it appropriate to uphold this aspect of the complaint.

Since the preliminary decision of this Office was issued, I note that the Complainant says that:

The Contract and Contract Conditions do not have printed, typed or written anywhere the phrase “Early Withdrawal Penalty” or any of the other phrases used - “Initial Units Cashing Factor”, “initial cashing factor”, and “Transfer Penalty”.

For the reasons explained above however, I am satisfied that the Provider was entitled to note that the chosen retirement date is 70 years of age, and the Complainant’s benefit fund can be “adjusted” as appropriate, if she chooses to retire before that time.

The Complainant also says that:

“There is no legal basis for the Actuary to use the phrase “the Actuary may adjust the Benefit Fund by such amount as shall be determined by him to be relevant at the date of retirement.” to remove a portion (or all) of the value of Initial Units from the fund.

There is no condition in the contract that allows for the devaluation of the fund and there is no Actuarial practice, allowed by law, that can give rise to a calculation that is not based on the contract or the law governing pensions and the activity of Actuaries.”

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I take the view however that it falls outside the scope of this investigation, to investigate any complaint that the Complainant may have, regarding the legal basis or validity of Clause 14(b) which I have quoted above, being a clause within the terms of the contract she long since entered into. Likewise, any grievance regarding the confines of actuarial practices permitted by Irish law, are not a matter for this Office.

B. Charging Issues

The Complainant has raised multiple issues in respect of the value of her fund. She argues that a review of the transaction history submitted by the Provider has shown:

- entire payments and part payments not credited to the fund,
- fee increases not allowed for in the contract,
- charges for which no explanation was given,
- initial units sold at incredible discounts to the date relevant value,
- multiple crediting and debiting of transactions,
- substantial overcharging of the pension levy,
- unexplained changes in initial units,
- new payment charges not allowed for in the contract,
- incorrect total amount of initial units purchased, and
- incorrect total amount contributed to the plan.

In response to the 107-page transaction history sent by the Provider with its final response letter which shows all payments into and all charges to the Complainant's fund, since its inception in **1991**, the Complainant has highlighted numerous entries which she is dissatisfied with and the reason for her dissatisfaction. She has also made extensive submissions on the relative values of initial and accumulator units and a lack of transparency concerning bid unit prices and other like matters.

In my preliminary decision, I noted that in the majority of these arguments, the Complainant had not submitted any supporting evidence of the errors, overcharges or valuations that she takes issue with. By way of example, I noted that, in respect of arguments that her pension fund was not credited with payments made on **1 May 1995** and **1 June 1995**, she had highlighted 'missing' monthly payments to the fund but had not submitted evidence that the relevant sum was paid by her on the relevant date. I considered the same to be true in respect of the Complainant's allegations that part of the premium paid was not attributed to her account on **29 April 2005** (€21.54 missing), **28 April 2006** (€22.16 missing), **30 April 2007** (€23.75 missing), **1 May 2008** (€24.94 missing) and **1 May 2009** (€26.19 missing).

The Provider has accepted that there were certain inaccuracies in the 107-page transaction history, and it has submitted into evidence a new transaction explanation which includes certain specific fees and charges.

The Provider has further set out the contractual or other bases for all fees, charges and levies applied to the plan as follows:

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- monthly plan fee/policy fee - paragraph 24 of the terms and conditions
- life cover charge/risk cost – paragraph 9 of the terms and conditions
- pension levy – imposed by the Irish government
- payment charge – paragraph 5 of the terms and conditions
- fund management in charge – paragraph 12 of the terms and conditions

Since the preliminary decision of this Office was issued, the Complainant has taken issue with the indication by this Office that it would not be appropriate for the FSPO to adjudicate this aspect of complaint. She has commented that:

“[The Provider] has presented the full transaction history to prove and document all (debit and credit) activity on the plan since inception and the value of which determines the value of my plan. The full transaction history is a fact in issue – facta probantia – it is not an interpretation, it is a true record of all of the credits and debits to the plan that have been made by [The Provider] (legal entity responsible) to the plan to allow them to prove the valuation of the plan.”

The Complainant also advised:

The FSPO, in its deliberations, has given legal interpretive weight to a report (a new transaction explanation also referred to by [the Provider] as “a document prepared by our Actuarial Team”) submitted to it by [the Provider]. The report has no evidential credibility in law. There is no evidence in the report as to who the author(s) is, how they are qualified to write the report, what information was available for analysis, when the report was produced and the report does not give evidence of any specific transactions, deals in generalities with no proof of specific actions and contains factual errors. This report, “a document prepared by our Actuarial Team”, is not constructed in accordance with the Society of Actuaries in Ireland guidance and would not be accepted as any kind of evidence in law.

These comments by the Complainant are such, that I remain of the opinion that the issues raised by the Complainant are of a complexity that calls for an expert forensic accountancy analysis of the transaction history of the Complainant’s pension fund, over a period of many years. Indeed, in my opinion, taking account of the Complainant’s specific contentions, such an analysis may also benefit from detailed cross-examination of expert witnesses as to actuarial practices and calculations.

I am conscious in this regard of **section 12(11)** of the **Financial Services and Pensions Ombudsman Act 2017**, as amended, which provides that:

“Subject to this Act, the Ombudsman, when dealing with a particular complaint, shall act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without undue regard to technicality or legal form.”

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As a result, it is my view that this aspect of the complaint is one of such a degree of complexity that the courts are a more appropriate forum and for that reason, I make no findings in respect of this aspect of the complaint. Instead, I consider it appropriate to discontinue the investigation into this aspect of the complaint pursuant **Section 52(1)(f)** of the **Financial Services and Pensions Ombudsman Act 2017**, so that the Complainant will be free to pursue these issues in another forum.

C. Provision of Information

By email dated **5 October 2017**, the Complainant wrote to the Provider with a series of 14 technical queries in respect of the operation of her pension fund. These included:

- the basis for the allocation of units between initial and accumulator units for each year the contract has been in place;
- details of the allocation of the fund bonus as a percentage and separated into initial and accumulator units for each year the contract has been in place;
- the basis for the annuity commencement date and age at which retirement is set in the policy contract;
- the basis for initial units cashing factor and its impact on fund value; and
- impact of initial units cashing factor on current fund value, future fund value and fund value if it becomes “paid-up.”

I note that after a prompt acknowledgement, the Provider sent a response by email dated **18 October 2017**. In respect of four queries (such as the basis of allocation of units between an initial and accumulator units for each year of the contract), the Provider stated that this information could not be provided.

Answers were given to the remainder of the queries, though the final question posed was omitted entirely, possibly in error. In respect of the annuity commencement date, the Provider indicated that the date is chosen at the start of the plan, and it could not provide a basis for how this was chosen. The mechanism by which the early withdrawal penalty was applied was also explained, including that as the plan gets closer to maturity, the initial units cashing factor becomes smaller, which reduces the amount of the early withdrawal penalty applicable to the plan.

By email dated **26 October 2017**, the Complainant responded that she was dissatisfied that the Provider failed to answer five of her questions. She argued that because the information requested related to the operation of the pension fund, and the calculation of contributions and fees charged, the Provider’s refusal to provide the information was not acceptable. The Complainant posed seven very detailed questions, quoting from contract terms and conditions and suggesting her own interpretation of various issues. Amongst other things, she queried how the Provider could contend that the chosen annuity commencement date is her 70th birthday, when the contract face indicated that she could retire between 60 and 70.

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I note that the Provider responded to each of the seven queries by email dated **7 November 2017**. In respect of the maturity date of the plan, the Provider confirmed that she could retire at any time between 60 and 70 but that a penalty is applicable before the plan's maturity date of 70 years old, due to the plan's charging structure.

By email dated **10 November 2017**, the Complainant responded that she was dissatisfied with the level of detail supplied by the Provider to her questions, arguing that the Provider had simply responded with basic statements, rather than the details requested. Further details and technical queries were raised by the Complainant in respect of each of the issues and further arguments were made by her in respect of her disagreement with some of the information provided, such as the maturity date of the plan.

The Provider responded by email dated **22 November 2017**. The Provider included further details in respect of some of her queries (e.g. in respect of the allocation of premiums and pension levy), though other queries were not dealt with e.g. the further arguments made by the Complainants in respect plan's maturity date.

By email dated **7 February 2018**, the Complainant wrote to the Provider stating that she had been trying to get answers to questions for some time and that the Provider had given her incomplete, incorrect or no answers to her questions.

The Complainant made detailed arguments as to her disagreement with the Provider's contention that the maturity date of the plan was 70 years, rather than any date between 60 and 70. She raised queries on the basis of the charge that the Provider proposed to apply, if she retired before the age of 70. She further argued that she received incomplete answers to the email she sent on **10 November 2017**.

The Provider acknowledged this email as a complaint on **7 February 2018** and a formal acknowledgement of complaint was sent to her on **13 February 2018**.

The Provider's final response letter is dated **7 March 2018**. This is an eight-page letter which includes two appendices. Appendix 1 is the 107-page transaction history on the Complainant's pension plan referred to above. Due to the length of the letter, I do not propose to set it out in full, especially the Provider's response to those issues already considered in detail above.

In my opinion however, it is appropriate to reproduce extracts from the letter to demonstrate the level of detail of the information provided to the Complainant in response to her complaint:

"Q1 – Please provide confirmation that the Normal Pension Contributions, after the initial two contractual years, were allocated to Accumulator Units.

I feel is important to provide a brief explanation of initial units and accumulated units in order to help answer your questions.

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Up until the mid-to-late 1990s, most of the annual premium pension products sold by [the Provider's predecessor], [the Provider] and indeed most other life offices, were products that used initial units as a mechanism for recouping the charges associated with setting up a plan; charges such as commission, administration costs and costs associated with the underwriting of the plan. This initial unit mechanism allowed us to spread the plan's (sic) charges evenly over the entire term of the plan from the start date to the maturity date.

These charges are shown on your plan as an early withdrawal penalty and if you decide to take your retirement benefits earlier then the charges are deducted from the gross value. The closer your plan gets to maturity, the lower the early withdrawal penalty will be as our costs have been recovered.

Generally, this worked as follows; during the first two years that your plan was in force, the contributions that were paid into your plan were used to buy 'initial units' which have a higher annual management charge applied to them than accumulated units and therefore grow at a slower rate. After this period of buying initial units, the contributions were used to buy accumulated units which carry a lower annual management charge. However, the initial units purchased continued to be held and continued to have the higher management charge applied to them right up to the maturity date.

I can confirm that normal pension contributions started to be allocated to the accumulated fund after the initial two years of your plan. A total of €11,115 of your normal pension contributions was allocated to the initial fund from the second year anniversary onwards. Payments stopped being allocated to the initial fund in March 2011.

Appendix one outlines when each of your normal pension contributions were added to your fund. Column D shows the fund that each contribution was allocated to, 846I represents the Initial fund and 846A represents the Accumulated fund."

The balance of the letter provides what I consider to be detailed explanations in respect of the allocation of increments, fees, the chosen annuity commencement date, the early withdrawal penalty, initial units chasing factor, government pension levies, the fees on paid up pension plans, benefit risk charges, and transfer values.

I appreciate that the Complainant was dissatisfied with the Provider's response, and that she is of the view that it has provided inaccurate and incomplete answers to her queries. In light of my decision to discontinue the investigation of this Office in relation to charging and valuation issues (as detailed at B above) I do not consider it appropriate to reach a conclusion on whether the information given to the Complainant in the final response letter and transaction history was inaccurate, as maintained by the Complainant, though I note that the Provider has accepted that there were certain inaccuracies in the 107 page transaction history, appended to its final response letter of March 2018.

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I am satisfied on the evidence that the Provider made a significant effort in the present matter, to provide complete and detailed transaction information to the Complainant in addition to helpful explanations on the operation, pricing structure and terms of the fund, not only in its final response letter, but also in its initial correspondence with the Complainant in **October and November 2017**. The level of technical detail sought by the Complainant was unusual and I think it likely that considerable time was taken by the Provider, to present her with the information that she sought.

I accept that during a telephone call on **18 April 2017** between the Complainant and a representative of Provider, the Provider's representative seemed to incorrectly inform the Complainant that the Provider was in a position to change the terms and conditions of the policy, seemingly on the basis that the original or first provider was no longer trading. This is disappointing, and unsatisfactory.

I do not accept that terms and conditions of a pension plan or any other contract, can be unilaterally amended in this manner, by an original contracting party or an assignee, other than by reference to original terms and conditions that would allow for such amendments. While I accept that this information was inaccurate, I am not of the view that it gave rise to any particular prejudice or consequence, for the Complainant, at that point.

In my opinion, in the round, the Provider's representative in question attempted to provide clear and detailed answers to the Complainant in respect of her queries. She highlighted that the policy had always had a maturity date of **2035** i.e. a normal retirement age of 70 years. This representative explained the reason why pension policies from that relevant time, almost always had a maturity date of 70 years (i.e. the policy was much cheaper) and stated that although the Complainant could withdraw the fund from age 60 as indicated on the contract, this would incur an early withdrawal penalty. She explained that the policy was worth **€247,292.90** while the Complainant had paid in **€121,747.69**. She indicated that the early withdrawal "penalty" or adjustment, as at that date was **€13,233.82** and that there were a number of factors taken into account in calculating that penalty. The representative also explained that the penalty is reduced for every additional year, the money is left in the plan.

As there does not appear to have been any fallout from the limited misinformation given to the Complainant during that call, I do not consider it appropriate to uphold this aspect of the complaint, on the basis of the representative's inaccurate suggestion that the Provider could amend the conditions of the plan.

Having considered all of the evidence, I do not accept that the Provider poorly communicated with the Complainant, though as detailed above, I make no finding as to the suggested provision of misinformation to the Complainant in respect of the issues arising under item B above (i.e. fees, charges, valuations, etc).

In all of the circumstances, this aspect of the complaint is not upheld.

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Conclusion

My Decision is that the elements of the Complainant's complaint which have been adjudicated, are rejected, pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



**MARYROSE MCGOVERN
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN (ACTING)**

22 February 2022

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
 - (ii) a provider shall not be identified by name or address,
- and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.